UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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VJOCA SELMANOVIC, GRACIELA DASILVA and ROBIN MAX MORRIS,

Plaintiffs,

-against-

06 Civ. 3046 (DAB)
MEMORANDUM & ORDER

NYSE GROUP, INC., now the owner of the entity previously known as the NEW YORK STOCK EXCHANGE, INC., BUILDING MAINTENANCE SERVICES, LLC, and DOE CORPORATIONS 1-5,

Defendants.
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DEBORAH A. BATTS, United States District Judge.

Defendant Building Maintenance Services, LLC ("BMS") moves to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), the gender discrimination and retaliation claims brought against it by Plaintiff Vjoca Selmanovic ("Selmanovic") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 and 3 ("Title VII"), on the grounds that the claims were untimely filed. In the event the Court dismisses Selmanovic's Title VII claims, BMS also moves to dismiss Selmanovic's gender discrimination claims brought under the Administrative Code of the City of New York, §§ 8-107(1)(a) and (7) ("New York City Human Rights Law"), on the grounds that the Court should decline supplementary jurisdiction over these state law claims. Alternatively, if Selmanovic's

Title VII claims are dismissed, BMS moves to compel Selmanovic to resolve her remaining discrimination claims under state law at arbitration pursuant to a collective bargaining agreement to which Selmanovic's labor union is a party.

For the reasons set forth below, BMS' Motion to Dismiss Selmanovic's Title VII claims against it is GRANTED. BMS' Motion to Dismiss the New York City Human Rights Law claims against it is also GRANTED. The Court does not reach BMS' Motion to Compel Arbitration.

BACKGROUND

The Plaintiffs in this matter worked as porters at facilities operated by Defendant New York Stock Exchange, Inc. ("NYSE"). (Complaint ¶¶ 12, 39 & 64.) Plaintiff Graciela DaSilva ("DaSilva") "commenced her employment with BMS in March 1997" but was eventually placed on the "NYSE payroll in November 2002." (Id. ¶ 39.) BMS "provides cleaning services and cleaning personnel to the NYSE." (Id. ¶ 7.) Plaintiff Robin Max Morris ("Morris") began working "with the NYSE as a porter in the Maintenance Facilities Department" in 1981 and eventually was promoted to a supervisor position. (Id. ¶¶ 64-67.)

Like DaSilva, Plaintiff Selmanovic also began working at NYSE's facilities "when she accepted employment on the payroll of

BMS in August 1997, and worked as a porter solely and entirely for the NYSE." (Id. ¶ 12.) In contrast to DaSilva, however, who claims that she was eventually transferred from BMS' payroll to NYSE's payroll, it appears from the Complaint that Selmanovic was at all times on the payroll of BMS. Selmanovic nevertheless alleges that "BMS essentially relinquished control over her performance, which was assumed by the NYSE . . . so that Selmanovic reasonably regarded herself to be an employee of the NYSE and was treated as such by the NYSE and was accepted as a NYSE employee by all those who had any dealings with her." (Id. ¶ 13.) Although Selmanovic regarded herself to be an NYSE employee, she also apparently continued to be a BMS employee. The Complaint alleges that NYSE and BMS "existed in a dual employment relationship regarding the persons on the BMS payroll such as Selmanovic who were assigned to and who did work in the NYSE's facilities." (Id. ¶ 14.) The Complaint thus refers to both NYSE and BMS collectively as "NYSE". (Id.)

While all three of the Plaintiffs have brought claims against NYSE, "the only Plaintiff with a claim against BMS is Selmanovic, as Plaintiffs DaSilva and Morris were employees only of the NYSE and had no affiliation with BMS." (Pl. Opp. at 4, n.1.)

The Plaintiffs' gender discrimination and retaliation claims arise from the alleged failure of NYSE and BMS to "remedy the sexually harassing and retaliatory hostile environment that existed in the NYSE facilities" where the Plaintiffs worked. (Id. ¶ 9.) The source of the sexual harassment at the NYSE facilities allegedly was an individual named Alexis Camarena ("Camarena") who "served as a porter in the NYSE facilities with Selmanovic, was promoted to the supervisory position of 'Lead Porter,' and had supervisory authority over Selmanovic, as well as other porters, and was an employee of the NYSE." (Id. ¶ 16.) The Complaint alleges numerous instances of egregious forms of sexual harassment by Camarena directed towards Selmanovic (Id. ¶ 18) and DaSilva (Id. ¶¶ 45-47 & 50). The Plaintiffs allege that NYSE was aware of Camarena's gross conduct but did nothing to redress or prevent it. (Id. ¶ 29.)

Selmanovic repeatedly complained about Camarena's offensive conduct towards her to Max Morris "who was Camarena's supervisor, and who actually observed some of Camarena's conduct." (Id. ¶ 20.) Although "Morris reported Selmanovic's complaint to his own manager" at NYSE, "the NYSE ignored the complaints Morris reported." (Id.) Selmanovic alleges that instead of disciplining Camarena, NYSE actually promoted him. (Id. ¶ 21.) On April 4, 2003, "and several rimes thereafter, Selmanovic,

along with co-Plaintiff [DaSilva] complained to the NYSE's Human Resources Department regarding the sexual harassment." (Id. ¶ 23.) NYSE's Human Resources Department, however, refused to effectively respond to the complaints and allegedly engaged in "a vicious pattern of retaliation and intimidation" against Selmanovic and DaSilva for having raised their complaints. (Id. ¶¶ 27-28.) The Complaint does not contain any specific allegations that Selmanovic complained to any supervisors or managers at BMS about Camarena's sexually harassing conduct.

Selmanovic and DaSilva filed charges with the Equal Employment Opportunity Commission ("EEOC") on August 31, 2003 "along with a supplemental charge filed on December 31, 2003" alleging the NYSE was engaging in gender discrimination and retaliation. (Id. ¶ 27.) BMS contends that the "EEOC issued a Dismissal and Notice of Rights . . . finding no probable cause against BMS" on September 22, 2005. (Def. Mot. Dismiss at 3 & Sigda Aff. at Ex. 3.) Selmanovic does not deny this. (Pl. Opp. at 4-5.)

The September 22, 2005 Dismissal and Notice of Rights informed Selmanovic that the reason the EEOC was closing its file on the charge made against BMS was that "Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes."

(Sigda Aff. at Ex. 3.) Selmanovic was further advised by the Dismissal and Notice of Rights that any lawsuit she might wish to file against BMS under Title VII had to be filed within 90 days of her receipt of the Notice. (Id.) Selmanovic did not file suit against BMS until April 20, 2006, when the instant Complaint was filed. It is therefore undisputed that Selmanovic did not file suit within 90 days of receiving the September 22, 2005 Dismissal and Notice of Rights regarding BMS.

The EEOC dismissed the discrimination charge brought against BMS "while the conciliation process between Selmanovic and the NYSE continued." (Pl. Opp. at 5.) Ultimately, this conciliation process was unsuccessful and "the EEOC issued a right-to-sue letter against the NYSE on March 28, 2006." (Id.) As BMS cogently points out, however, after September 22, 2005, it "was not involved in the EEOC conciliation process, as the EEOC had already dismissed the charge against BMS." (Def. Reply at 3.)

DISCUSSION

A. Legal Standard for Motion to Dismiss

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) the Court "must accept as true the factual allegations in the complaint, and draw all reasonable inferences in favor of the plaintiff." Bolt Elec. v. City of New York, 53 F.3d 465, 469 (2d

Cir. 1995) (citations omitted). "The district court should grant such a motion only if, after viewing the plaintiff's allegations in this favorable light, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Harris v. City of New York, 186 F.3d 243, 247 (2d Cir. 1999). A court does not, however, have to accept as true "conclusions of law or unwarranted deductions of fact." First National Bank v. Gelt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994), cert. denied, 513 U.S. 1079 (1995).

B. Selmanovic's Title VII Claims Against BMS

An employment discrimination complaint under Title VII must be filed in district court within 90 days after a plaintiff receives notice of final action by the EEOC, commonly referred to as a "right-to-sue" letter. 42 U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 12117(a); see also Cornwell v. Robinson, 23 F.3d 694, 706 (2d Cir. 1994) (Title VII suit "must be commenced not more than 90 days after receipt of the right-to-sue letter"). As discussed above, it is undisputed that Selmanovic failed to file her Title VII claims against BMS within 90 days of receiving the EEOC's September 22, 2005 Dismissal and Notice of Rights regarding BMS.

In defense of her untimely Title VII claims against BMS, Selmanovic contends that she "did not bring suit against BMS

during the conciliation process because that would have frustrated, and been contradictory to, the EEOC's efforts to resolve these claims without litigation." (Pl. Opp. at 6.) Selmanovic further argues that "given the closely integrated economic relationship between BMS and the NYSE, the right-to-sue against the NYSE should properly be imputed to BMS." (Id.)

While it is settled that the 90 day deadline to file Title VII claims is not a jurisdictional prerequisite, the deadline nevertheless effectively functions as a statute of limitations. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002); Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143, 146 (2d Cir. 1984). The courts have recognized that the "remedial purpose of the [civil rights] legislation as a whole" would be defeated if aggrieved plaintiffs were absolutely barred from pursuing judicial remedies by reason of excusable failure to meet the time requirements. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982). Equitable tolling of the 90 day filing requirement is, however, applied only in a narrow set of circumstances:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less

> forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (footnotes and citations omitted). The Supreme Court has further admonished that "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152 (1984); see also Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143, 146 (2d Cir. 1984) ("[I]n the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day").

Thus, the 90 day time limit ought to be tolled only for reasons such as "(1) the claimant received inadequate notice, (2) there is a pending motion for appointment of counsel, (3) the Court misled the plaintiff and as a result the plaintiff believed he had done everything required of him, or (4) the defendant engaged in affirmative misconduct, encouraging the plaintiff to take no action." Rosquist v. NYU Med. Ctr., 1998 WL 702295, at *5 (S.D.N.Y. 1998), aff'd, 199 F.3d 1323 (2d Cir. 1999) (citing Baldwin County, 466 U.S. at 151). The reasons that Selmanovic provides for failing to file her Title VII claims against BMS in

a timely fashion do not fall within the narrow set of circumstances that could justify equitable tolling of the 90 day filing requirement.

Selmanovic relies on Streeter v. Joint Indus. Bd. Of Electrical Indus., 767 F.Supp 520, 524 (S.D.N.Y. 1991)(citing Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354, 1358-59 (9th Cir. 1975); Chung v. Pomona Valley Community Hospital, 667 F.2d 788, 792 (9th Cir. 1982), for the proposition that "[w]here two or more defendants are closely related entities, an administrative charge and right to sue notice against one defendant may be sufficient to provide notice to the other defendants and thus satisfy the administrative filing requirements." In that case, the issue before the court was whether co-plaintiffs can "sue defendants who were named by neither plaintiff in her administrative complaint, but who are allegedly related to respondents named in that complaint." Id. Two of the defendants argued that the "court does not have subject matter jurisdiction over plaintiffs' Title VII claims because they were not named as respondents in either plaintiff's administrative complaint." Id. The court held that it would defer deciding on this issue until the proceedings had reached the summary judgment stage. Id. at 525.

Here, by contrast, Selmanovic had specifically named BMS in her administrative complaint to the EEOC. Significantly, the plaintiffs in Streeter had argued "that they should be relieved of the administrative filing requirement as to the [two defendants] because they were unaware that [they] were responsible parties." Id. at 525 n.5. Selmanovic, on the other hand, was obviously aware that BMS might be liable to her under Title VII since at least 2003, when she filed her complaint with the EEOC. The holding in Streeter upon which Selmanovic would rely simply does not apply in this instance.

Accordingly, because Selmanovic's Title VII claims against BMS were untimely filed and because there is no basis for equitable tolling of the 90 day filing period, BMS' Motion to Dismiss the Title VII claims against it is GRANTED.

C. Supplemental Jurisdiction Over the New York City Human Rights Law Claims Against BMS

Where a case is properly before a federal district court on the basis of federal question jurisdiction, the court has supplemental jurisdiction over "all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). The district court, however,

may decline to exercise supplemental jurisdiction over a claim if (1) the claim raises novel or complex issues of state law, (2) the state law claim "substantially dominates" over the federal claim, (3) the district court has dismissed all federal claims, or (4) there are other compelling reasons or exceptional circumstances that would justify declining jurisdiction. 28 U.S.C. § 1367(c)(1)-(4).

BMS contends that "there are exceptional circumstances to decline supplemental jurisdiction" over Selmanovic's remaining claims against it pursuant to 28 U.S.C. § 1367(c)(4), arguing essentially that "Selmanovic should not now be rewarded for failing to bring [her Title VII claims] within the applicable limitations period." (Def. Reply at 4.) BMS also argues that it has "nothing to do with the claims of the other two plaintiffs." (Id.)

The Court is indeed concerned that the Complaint contains only the most generalized allegations against BMS. As Selmanovic herself admits, she is the only Plaintiff with any claims against BMS "as Plaintiffs DaSilva and Morris were employees only of the NYSE and had no affiliation with BMS." (Pl. Opp. at 4, n.1.) Further, while the Complaint specifies that Selmanovic and DaSilva caused their supervisors at NYSE and the Human Resources Department of NYSE to become aware of Camarena's alleged sexual

harassment, (Complaint ¶¶ 20 & 23), there is no allegation that BMS' management was so notified. Notwithstanding that the Complaint styles "NYSE" generically to mean both NYSE and BMS, the substantive allegations supporting Selmanovic's Title VII and New York City Human Rights Law claims exclusively refer to her NYSE supervisors (Id. ¶ 20), NYSE's Human Resources Department (Id. ¶ 23-24), NYSE managers' alleged failure to appropriately respond to her complaints (Id. ¶ 25), NYSE's alleged condonation of sexual harassment in the workplace (Id. ¶¶ 26 & 29) and NYSE's alleged retaliation against her (Id. ¶ 28). In context, it is clear that the specific allegations just referenced are made only with respect to NYSE. (See Id. ¶¶ 6-8; Pl. Opp. at 4, n.1; Sigda Aff. at Ex. 3.)

Given the vagueness of the allegations against BMS and considering that Selmanovic's federal claims against BMS have been dismissed for failure to file in a timely fashion, the Court finds that there is compelling reason for it to decline exercising supplemental jurisdiction over Selmanovic's remaining state law claims against BMS. Accordingly, BMS' Motion to Dismiss Selmanovic's New York City Human Rights Law claims is GRANTED. The New York City Human Rights Law claims against BMS are DISMISSED WITHOUT PREJUDICE.

LEAVE TO AMEND

Rule 15(a) of the Federal Rules of Civil Procedure requires that courts freely grant leave to amend "when justice so requires." Fed. R. Civ. P. 15(a). "[I]t is the usual practice upon granting a motion to dismiss to allow leave to replead." Cohen v. Citibank, 1997 WL 88378 at *2 (S.D.N.Y. 1997). Absent a showing of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or the futility of the amendment, a plaintiff should be granted leave to replead. See Protter v. Nathan's Famous Sys., Inc., 904 F.Supp. 101, 111 (E.D.N.Y. 1995) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

However, if an amendment would be futile, a court may deny leave to amend. See Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 168 (2d Cir. 2003) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). "A proposed amendment to a pleading would be futile if it could not withstand a motion to dismiss pursuant to Rule 12(b)(6)." Id. (citing Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991)).

It is clear that Defendants NYSE and BMS stand in different postures vis-à-vis the three Plaintiffs. As discussed above, the Complaint is far too vague and general with respect to the remaining New York City Human Rights Law claims against BMS. It

would be premature, however, to conclude that Plaintiffs could not adequately plead such claims against BMS. Therefore, Plaintiffs are GRANTED leave to amend the Complaint, within (30) days of the date of this Memorandum and Order, by setting forth with particularity, allegations that would support possible claims against BMS under the New York City Human Rights Law.

CONCLUSION

For the foregoing reasons, BMS' Motion to Dismiss the Title VII claims and the New York City Human Rights Law claims against it are both GRANTED. The New York City Human Rights Law claims against BMS are DISMISSED WITHOUT PREJUDICE. Plaintiffs, however, are GRANTED leave to amend the Complaint within thirty (30) days of the date of this Memorandum and Order, but only as to possible New York City Human Rights Law claims against BMS.

SO ORDERED.

Dated: New York, New York
March 28, 2007

Deborah A. Batts
Deborah A. Batts
United States District Judge